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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

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No. —.

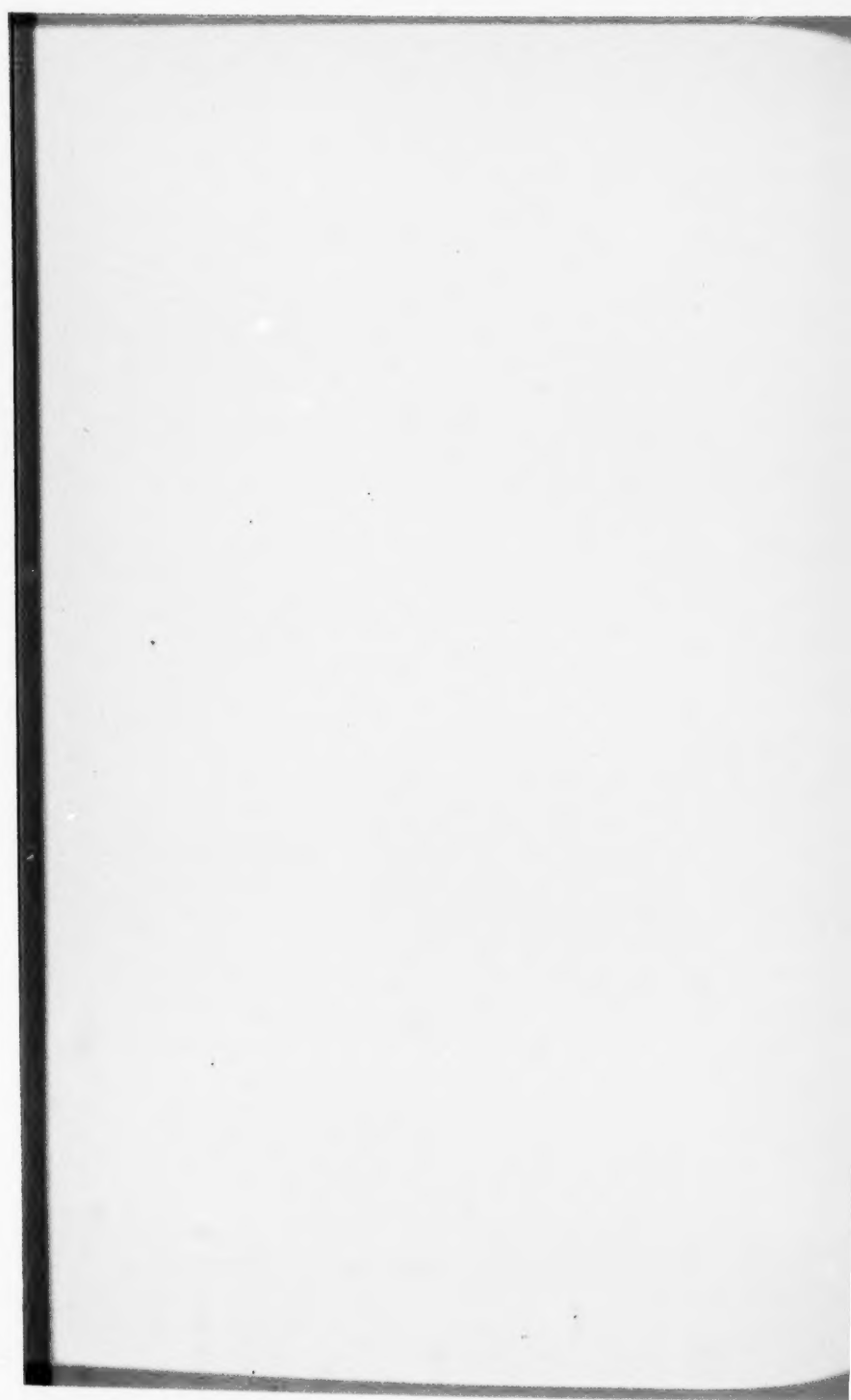
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DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE.

—
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA, AND SUPPORTING
BRIEF.**

—
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Daniel F. Boone, by his attorneys, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on December 22, 1942, affirming the judgment of the District Court of the United States for the District of Columbia, entered on March 13, 1942 (R. 89).

OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in entering its Order (R. 27-28).

The opinion of the United States Court of Appeals for the District of Columbia (R. 81) in 76 App. D. C. —, — Fed. (2d) — (Adv. Sheets).

A timely petition for a rehearing was denied by the United States Court of Appeals for the District of Columbia, on December 22, 1942, (R. 83-89).

STATEMENT OF MATTER INVOLVED.

The petitioner, Daniel F. Boone, and the respondent, Martha Lightner Boone, are husband and wife. They have two children, Daniel L. Boone, born on May 23, 1935, and Martha Penelope Boone, born on September 14, 1938. The petitioner and respondent lived together as man and wife in the State of North Carolina until about April 13, 1939, when they separated (R. 6). They entered into a formal separation agreement on September 30, 1939, whereby the respondent (wife) gave to the petitioner (husband) the entire and absolute custody of their two children. The wife reserved to herself the right (if she so desired) of visitation on 2 days each month. The husband has had continuous custody of both children from September 30th, 1939, up to the present time (R. 16).

The appellant moved to the District of Columbia with both children on or about November 1, 1940, and established a home with them in this jurisdiction, he having entered the military service on or about that date. The children have resided with the petitioner in the District of Columbia since November 1, 1940, and have never returned to the State of North Carolina (R. 16).

On April 16, 1941, the petitioner, although actually residing in the District of Columbia, filed suit for a divorce from

the respondent in North Carolina. The respondent answered the said divorce suit, and requested in her answer that she be awarded partial custody of the children (R. 7-11). The divorce case came on for hearing in North Carolina on June 23, 1941, and the petitioner having received but one day's leave of absence from his official duties for this trial testified on June 23, 1941, in that case (R. 15). Petitioner had not completed his testimony on June 23, 1941, and he was required to return to his military duties in the District of Columbia; he left North Carolina on the evening of June 23, 1941, and immediately gave up his domicile in that state (R. 15). Thereafter, in the absence of the petitioner, who was on military duty, the trial court of North Carolina proceeded with the divorce case for several days and entered its interlocutory order on July 2, 1941, awarding complete custody of both children, who were not within the jurisdiction of the court, to the respondent. Although a trial was held on the issues of the divorce, (which was not contested) the order of the North Carolina Court makes no reference whatsoever to the divorce itself (R. 12-14), but is entitled merely an "Order Awarding Custody".

On February 6, 1942, the respondent filed her petition for a Writ of Habeas Corpus in the District Court of the United States for the District of Columbia, seeking the custody of the said children, alleging that petitioner was detaining them illegally, and had failed to obey the Order of the North Carolina Court of July 2, 1941, awarding to her the custody of the children (R. 2). The petitioner answered the writ of Habeas Corpus, wherein he denied the contentions of the respondent. Among other things, he stated in this answer that the Order of the North Carolina Court was not binding upon him; that it had no extraterritorial effect; that the children were not residents of North Carolina, nor, before the North Carolina Court when the Order was entered; that the respondent was not a fit custodian for the children (R. 14-21).

After hearing upon the Petition for the Writ of Habeas Corpus and the Answer thereto, the judge in the District Court of the United States for the District of Columbia, ruled that he would not, and could not, go behind the North Carolina Order of July 2, 1941 (R. 26). The trial judge in so ruling, erroneously stated that he was "bound by the terms of the final judgment" of the North Carolina Court (R. 23). He refused to permit the petitioner to offer any testimony as to the character of the respondent on the issue of her fitness to be custodian of the children occurring prior to the date of the Order of the North Carolina Court (R. 29-33).

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the act of February 13, 1925, which provides that certiorari should be granted:

"Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the constitution, or a treaty or statute of the U. S., which has not been, but should be, settled by this court, or where that court has not given proper effect to an applicable decision of this court."

The question of "substance" claimed by the petitioner, is, the denial to him of due process of law, as guaranteed by the Fifth Amendment of the Constitution of the United States, because of the failure of the court below to grant him a full and complete hearing, and in view of its erroneous decision in giving full faith and credit to the interlocutory of the North Carolina Court giving custody of the non-resident children to the respondent.

The court below stated in its opinion that the effect of *res judicata* could be given to the North Carolina Order, (R. 82) and for that reason it would not go behind the Custody Decree of that jurisdiction. It is our contention that the lower court in giving the effect of *res judicata* to the North

Carolina Decree, which is not a final order or decree, deprived the petitioner of due process of law as guaranteed by the 5th Amendment of the Federal Constitution.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia, entered on November 30, 1942, (R. 81). Timely petition for a rehearing was denied on December 22, 1942, thus making it a final judgment for the purpose of this petition.

QUESTIONS PRESENTED.

1. Did the lower court in passing upon the question of the custody of children residing in the District of Columbia, err in failing to go behind the interlocutory order of the North Carolina Court as to their custody?

2. Did the lower court err in holding itself "bound" by the North Carolina Order, and in giving to it the effect of *res judicata*, when such order, is not such a final order so as to be entitled to full faith and credit under the Federal Constitution?

3. Is it not a violation of Due Process of Law in failing to give petitioner a full hearing on Writ of Habeas Corpus, when the lower court erroneously concludes it is bound to give full faith and credit to a judgment which is not entitled to full faith and credit under the Federal Constitution?

4. Is it not a violation of Due Process of Law, in denying the petitioner the right to rebut the statements of the respondent at the hearing upon the Writ of Habeas Corpus, in which she alleged that she was a fit and proper person to have the custody of the children?

5. Is it not a violation of Due Process of Law in a matrimonial action, whether annulment, divorce, or separation, to award custody of non-resident children, especially when the court fails to enter a judgment or decree on the primary issue involved?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

(A) Since two or more courts of last resort are in dispute over the question involving the proper interpretation of the Due Process clause of the Federal Constitution, we submit that this Court should allow this Writ in order to decide the question. The several decisions in conflict by the United States Court of Appeals for the District of Columbia appear in the brief in support of this Writ. We, therefore, submit that this Court should accept this case to clarify the law.

Petitioner respectfully submits, that he has been denied due process of law as guaranteed by the 5th Amendment to the Constitution of the United States, because the lower court erroneously gave the effect of *res judicata* to a decree of North Carolina which was not entitled to full faith and credit. By thus erroneously giving full faith and credit to an interlocutory decree, your petitioner has been deprived of a full opportunity to be heard, and of his day in court, as are requisite to the due process as is guaranteed by the Federal Constitution.

The decision of the lower court expressly states that the petitioner was deprived of his right to a full and complete hearing, but justifies such deprivation upon an erroneous theory of *res judicata*.

It is our contention, that giving the effect of full faith and credit to a judgment which is not entitled to such is a denial of due process. The refusal of the trial court to permit petitioner to go behind the North Carolina Order, and to introduce evidence concerning the character and fitness of the respondent to be custodian of the children, (residents of the District of Columbia) or her actions prior to the North Carolina Decree, was a denial to petitioner of a substantial right, and was vital to sustain his answer denying the fitness of the respondent to be a proper custodian for the two children. The question is a substantial one,

and it is most desirable that this Court determine whether a Federal Court may so limit a litigant in his proof so as to deprive him of due process, and justify such denial on an erroneous application of the full faith and credit clause of the Federal Constitution.

(B) It is our further contention, that the petitioner was denied due process of law, when the trial court refused to allow him to rebut the statements of this respondent made in her petition for a Writ of Habeas Corpus, wherein she stated, and put in issue, that she was a fit and proper person to have the custody of the children. The court erroneously rejected such testimony offered by the petitioner, upon the ground that the issue was *res judicata*, and that the court had to give full faith and credit thereto. Such is not correct, as the issue was not *res judicata*, nor did the court have to give full faith and credit thereto, since the North Carolina Order was not a *final* decree.

(C) It is our further contention, that the petitioner was denied due process of law in not being allowed to go behind the North Carolina Order when the record disclosed that the North Carolina Court had awarded custody of the non-resident children, when the primary issue involved a divorce and no order or decree was entered granting or denying a divorce. Therefore, the respondent had no standing in court as the court had no authority to grant custody to the respondent unless a divorce was granted. When no divorce was granted, the court lost jurisdiction of the case. Therefore, if the North Carolina court had no jurisdiction to award custody, there is no reason why the District Court on Petition for Habeas Corpus should give full faith and credit to a void order of a State Court; and by erroneously giving full faith and credit, the petitioner was denied his due process of law.

Wherefore, your petitioner respectfully prays that this Court issue a Writ of Certiorari, to the United States Court of Appeals for the District of Columbia, to certify

and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment or order may be reversed with costs and for such other and further relief as may be appropriate.

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